

STAR, Inc. Lighting the Way and United Food and Commercial Workers, Local 371, AFL-CIO.
Case 34-RC-1820.

July 31, 2002

**DECISION AND DIRECTION OF SECOND
ELECTION**

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

The National Labor Relations Board has considered objections to an election held between July 13 and 21, 2000,¹ and the Hearing Officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on June 19. The tally of ballots shows 44 for and 74 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs,² affirms the hearing officer's findings³ and recommendations⁴ for the reasons set forth below, and finds that the election must be set aside and a new election held.

The hearing officer found merit in the Union's Objection 4, which alleges that the Employer interfered with the election by announcing and distributing a fiscal year-end, cash bonus to unit employees approximately 2 weeks before the election. We agree with the hearing officer that the Employer failed to establish that it had a past practice of paying such bonuses, and we find that the bonus reasonably tended to interfere with the employees' free choice in the election.

BACKGROUND

The Employer contracts with the State of Connecticut to provide residential, employment, and other services to

the mentally handicapped. It was formed on October 2, 1999, as a result of the merger of two entities, S.T.A.R. Residential Services, Inc., and the Society to Advance the Retarded and Handicapped.⁵ On June 27, 2000, Executive Director Benzhaf notified employees that they would receive fiscal year-end cash bonuses on June 30, the last day of the fiscal year. As stated, employees who worked at least 20 hours a week for the year received \$400, and employees who worked fewer than 20 hours a week received \$200. On call employees received \$100. Employees who worked less than a year received prorated sums based on their length of service.

The Employer asserted its past practice was to pay such bonuses when it experienced a surplus at the end of the fiscal year. With respect to past practice, the record shows that on June 30, 1995, the former Society to Advance the Retarded and Handicapped announced to its employees that it would pay a fiscal year-end bonus the following week. It withheld taxes and made other customary deductions from the employees' bonus checks, which ranged from \$100 to \$400 before withholdings. The only other fiscal year-end bonus paid to the employees in the 5-year span was in 1999, when the former S.T.A.R. Residential Services decided in June to pay its employees a bonus. Thereafter, in August 1999, employees who participated in its retirement plan received a 3 percent contribution to the plan, and all other regular employees received bonus checks in the amount of \$225. No other records of year-end bonuses were produced. In 1998, when the Society to Advance the Retarded and Handicapped faced a surplus, it did not grant bonuses at the end of the fiscal year. Instead it instituted a "Quality Enhancement Program" (QEP) under which it raised base salaries and created new classifications. Any bonuses paid under the QEP were given "in a discretionary way to reward and recognize quality staff," and were not paid across the board.

ANALYSIS

The Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the benefit. *Uarco, Inc.*, 216 NLRB 1 (1974). In making a determination, the Board will examine the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the

¹ The manual election was conducted on July 14, and the mail ballot election was conducted between July 13 and 21. Except where otherwise stated, all dates refer to 2000.

² On February 2, 2001, the Employer filed a Motion to Reopen the Record for Receipt of an Exhibit, and the Union filed an opposition. Because the exhibit, a January 16, 2001 letter, was previously unavailable, we grant the Employer's motion. As explained below, however, we find that the exhibit is not dispositive.

³ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

⁴ In the absence of exceptions, we adopt the hearing officer's recommendation to overrule Objection 2 concerning conversations between or among supervisory House Managers, Executive Director Katie Benzhaf, and the Employer's attorney.

⁵ After initial objections by the Union, the hearing officer and the parties treated the two entities as one for purposes of arguing the existence or nonexistence of the merged entity's past practice.

purpose of the benefit. See *B & D Plastics*, 302 NLRB 245 (1991), and cases cited therein.

Applying that standard here, we find good reasons to infer that the year-end bonus interfered with free choice in the election. Its size (as much as \$400) was substantial, all of the employees received it, and all of them reasonably would have been influenced in their voting, especially given the timing of the bonus and its unprecedented features. As we will explain, the Employer has not succeeded in demonstrating that conformity to past practice explains the timing or grant of the bonus.

The evidence is insufficient to show that either of the separate entities or the merged entity had a past practice of granting bonuses at the end of the fiscal year, even when faced with a projected surplus. The only bonus that was similar to the pre-election bonus paid in 2000 was given 5 years earlier in 1995 by the Society to Advance the Retarded and Handicapped. The 1995 bonus was an across-the-board cash bonus, which ranged generally from \$100 to \$400, and was announced to employees on June 30. The similarities end there. The 1995 bonus differed from the 2000 bonus in that customary withholdings made in 1995 would have reduced the amounts employees actually received. It was also paid 1 week after the fiscal year ended.

When faced with a surplus in 1998, the Society to Advance the Retarded and Handicapped initiated the QEP and did not give across-the-board bonuses. In 1999, when S.T.A.R. Residential Services paid its employees fiscal year-end bonuses, eligible employees received a contribution to their pensions, while other employees received \$225. It is not clear whether the cash bonuses were reduced by withholdings. Not only were the 1999 bonuses not across-the-board cash bonuses, they were paid 2 months after the end of the fiscal year, in August, not promptly at the end of the year, as in this case.

It is clear that in prior years when the Employer did grant bonuses, it did so in a significantly different manner with respect to amount, scope or eligibility, and timing. As stated above, the 2000 bonus was larger than the bonuses distributed in 1995 and 1999. Withholdings were deducted from the 1995 bonus, reducing the amounts the employees actually received, and the 1999 bonus of \$225 was substantially less than the preelection bonus of up to \$400. Additionally, the record does not reveal whether the 1999 bonus was further reduced by withholdings. In the 6 years from 1995 to 2000, inclusively, the Employer had surpluses in 4 years but only paid across-the-board, cash bonuses in 1995 and 2000. In 1999, although all of the employees received a bonus, an unspecified number of the employees received a 3 percent contribution to their retirement fund instead of

cash. In 1998, under the QEP, bonuses were not paid on an across the board basis, if paid at all.

The 2000 bonus was announced on June 27, and paid almost immediately, on June 30. This contrasts sharply with the 1999 bonus, which was not paid until August 26—2 months after the decision to pay it was made and more than 3 weeks after written notice of it was given to employees. It also contrasts with the 1995 bonus, which too, was paid after the fiscal year ended. The Employer's accounting method and its contractual obligation to provide financial reports permitted it make actual payouts after the end of the fiscal year. The rushed payment of the 2000 bonus clearly supports a reasonable inference that it was timed to influence the employees' choice in the election.

In short, the 2000 pre-election bonus was larger than previous bonuses, was paid to proportionately more employees, and was paid faster than previous bonuses. Its potential impact on employees, meanwhile, is clear. Even though the Employer announced to employees that it was paying the 2000 fiscal year-end bonus pursuant to past practice, the lack of a practice belies the explanation. New employees would not reasonably have expected the bonuses, and as stated above, those with lengthy tenures would have been aware of the differences in the amount, scope, and timing of the pre-election bonus payments.⁶

In view of our determination that the bonus was not paid pursuant to past practice, we find it unnecessary to determine whether the hearing officer inaccurately analyzed the Employer's actual and projected budgets, as the Employer asserts in its exceptions. Further, we reject the Employer's assertion, in its motion to reopen the record, that the hearing officer's recommendations must be re-examined because its concern about having to return funds to the State (i.e., "cost-settling") was substantiated when it received a notice dated January 2001 from the State. Contracts for the years 1995, 1999, and 2000 are in evidence, and each contains cost-settling language.⁷ Further, a former consultant to S.T.A.R. Residential, Agatha Evans, and Benzhaf each testified that paying money back to the State was a consideration at the June 1999

⁶ See generally *DMI Distribution of Delaware, Ohio, Inc.*, 334 NLRB 409 (2001) (employer's 11-year practice of paying cash for extra work at other facilities was not shown to be a practice at the two year-old facility in issue, and employees would reasonably have understood that the bonuses were paid in order to influence their votes). See also *Perdue Farms, Inc.*, 323 NLRB 345 (1997) (employer's timing of a wage increase was deemed objectionable, as was the timing of its implementation of a pre-petition decision to eliminate attendance bonuses and roll them into salaries). Member Cowen does not rely on either of the above-cited cases in finding the Employer's conduct objectionable.

⁷ The Employer's 2001 contract is also in evidence. It, too, contains cost-settling language.

and June 2000 board meeting at which the decisions to pay bonuses were made.⁸ Assuming that cost-settling was a factor in the decision to pay bonuses in every year that surpluses existed, we find that it is not an exigency that would justify the different manner and timing of the payment of the 2000 bonus. This is because the Employer was not required to pay the bonus before the end of the fiscal year on June 30. Thus, the Employer could have waited until after the election period to announce and pay the bonus and still avoided returning funds to the

State. Hence, we find that the possibility of cost-settling with the State and the State's subsequent notice of intent to do so are not dispositive, given that the timing and method of payment tended to interfere with the employees free choice.

Accordingly, we find that the Employer engaged in objectionable conduct when it paid the employees a fiscal year-end bonus 2 weeks prior to the election.

[Direction of Second Election omitted from publication.]

⁸ The minutes from these meetings do not reflect that cost-settling was considered.